BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA GANNAWAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 165,903
DOLD FOODS, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON May 10, 1994, the Appeals Board heard claimant's request to review the Award entered by Special Administrative Law Judge William F. Morrissey, dated February 14, 1994.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

RECORD

The record is the same as that considered by the Special Administrative Law Judge.

ISSUES

The Special Administrative Law Judge found no work disability existed and granted benefits based upon permanent impairment of function to the body as a whole of twenty percent (20%). Claimant requests this review and contends the presumption of no work disability does not apply in this case. The issues now before the Appeals Board are:

(1) Nature and extent of disability, if any.

(2) Liability of the Kansas Workers Compensation Fund, if any.

The Special Administrative Law Judge considered other issues; however, the parties agreed to the findings of the Special Administrative Law Judge pertaining to those issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

For the reasons expressed below, claimant is entitled permanent partial general disability benefits based upon a twenty-five percent (25%) work disability for accidental injury occurring through May 15, 1992. For purposes of computation of this Award, May 15, 1992, is designated the date of accident.

(1) Claimant worked for the respondent, a pork processing plant, from 1984 to May 15, 1992. During this period of time, claimant worked on the bacon line and experienced the onset of pain and numbness in both hands and arms that gradually worked up into the shoulders and neck. In 1988, claimant began treatment with a chiropractor for symptoms around her neck and shoulders. Also in 1988, claimant experienced numbness in both hands. In April 1990, claimant's symptoms worsened and she sought treatment through her employer who sent her to the company doctor. After seeing the company physician, claimant was referred to Wichita orthopedic specialist, J. Mark Melhorn, M.D.

Claimant's treatment with Dr. Melhorn began in September 1990. Claimant last saw Dr. Melhorn on May 11, 1992, complaining of pain in her hands and wrists, aches and pain around the neck, and numbness in her fingers. Dr. Melhorn's final diagnosis was bilateral tendinitis of the forearms and subjective complaints of pain in the shoulders. Although claimant has had symptoms from 1988 and treated with Dr. Melhorn for more than a year and one-half, the doctor did not believe claimant had experienced permanent injury or permanent aggravation as of her last visit.

At her attorney's request, claimant saw Wichita physician Ernest R. Schlachter, M.D., for medical evaluation on December 1, 1992. Dr. Schlachter diagnosed overuse of the cervical spine, both shoulders, and both upper extremities. Dr. Schlachter believes claimant has experienced a ten percent (10%) impairment of function to the body due to the cervical spine and bilateral shoulder injuries, and ten percent (10%) impairment to each upper extremity, all of which convert to a twenty-one percent (21%) permanent impairment of function to the body as a whole. The doctor believes the claimant should not repetitively push, pull, twist or grasp with either hand or shoulder; should not lift greater than twenty (20) pounds repetitively or thirty (30) pounds in a single lift; and, should avoid cold environments and vibratory tools.

Respondent was aware of the problems and difficulties claimant was having with her neck and, in fact, advised claimant to submit the chiropractic bills to the health and accident insurer, and that the bills would not be paid if they were submitted to the workers compensation insurance carrier. Before she returned to the chiropractor for additional treatment in September 1990, claimant had seen the doctor thirteen (13) times in 1988 and twelve (12) times in 1989.

Respondent argues the opinions of Dr. Schlachter should be disregarded because claimant worked for several employers after leaving the respondent. Although claimant did

work for several weeks as a nurse's aide, part-time as a cashier in a grocery store, and two to three (2-3) months at a manufacturing concern before her evaluation with the doctor, the Appeals Board finds those factors do not justify total disregard of his testimony but only affect its weight.

Based upon the testimony of claimant and Dr. Schlachter, the Appeals Board finds claimant did sustain permanent injury and impairment as a result of her work for the respondent. Claimant's testimony is credible and persuasive. Claimant terminated her employment with respondent because she did not believe she could continue to do that type of work. Although at the time of her termination claimant was working without restrictions, the evidence is uncontroverted claimant asked Dr. Melhorn to release her to her regular work and drop the temporary restrictions he had given her which were significant. It is also uncontroverted Dr. Melhorn told claimant on several occasions to change occupations.

The existence, nature, and extent of disability is a question of fact. Medical testimony is not essential to the establishment of those facts. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The Appeals Board finds claimant's actual impairment and restrictions fall somewhere between the opinions of Doctors Schlachter and Melhorn. As claimant testified, pursuant to court order, she saw Dr. Blaty, a Wichita physician, who provided restrictions similar to those of Dr. Schlachter but not as restrictive. Unfortunately, Dr. Blaty did not testify and the parties agreed that his opinions would not be used to determine extent of disability.

Claimant is entitled an award of permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The above-cited statute also contains a presumption that an employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. This presumption does not apply because claimant has not earned a comparable wage since leaving the respondent's employ. As of the date of her testimony, claimant had obtained lighter work with a manufacturing company operating a press and earning $8.41 per hour. At the time of the regular hearing, claimant was not receiving additional compensation items and was not sure if, or what, additional compensation items might be available to her in the future. The Administrative Law Judge found that claimant's average weekly wage on the date of accident was $451.52. The parties do not dispute that finding and the Appeals Board adopts it as its own. Comparing the difference in claimant's pre-injury wage of $451.52 per week and the post-injury wage of $336.40 per week ($8.41 x 40 hours), the Appeals Board finds claimant has experienced a twenty-five percent (25%) loss of ability to earn a comparable wage.

The only labor market expert to testify was claimant's witness, Mr. Jerry D. Hardin. Mr. Hardin testified that claimant has lost seventy to seventy-five percent (70-75%) of her ability to perform work in the open labor market considering the restrictions of Dr. Schlachter. Assuming claimant is not physically restricted as Dr. Melhorn believes, claimant would have neither loss of ability to perform work in the open labor market nor loss of ability to earn a comparable wage.

Based upon the above, claimant's loss of ability to earn a comparable wage falls within the range of zero to twenty-five percent (0-25%) and loss of ability to perform work in the open labor market falls within the range of zero to seventy-five percent (0-75%). Giving equal weight to the opinions of both Doctors Schlachter and Melhorn, and giving equal weight to both losses, the Appeals Board finds that claimant has experienced a twenty-five percent (25%) work disability as a result of her work activities with the respondent. The Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage; however, in this case there appears no compelling reason to give either factor greater weight. See Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990); and, Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(2) The Workers Compensation Fund is responsible for fifty percent (50%) of the temporary total and permanent partial disability benefits and costs associated with this Award. However, the Kansas Workers Compensation Fund is responsible for all of the medical expense for treatment of the neck and shoulders.

The parties stipulated the letter written by Dr. Schlachter, dated February 25, 1993, would be admitted into evidence. After reviewing records from claimant's chiropractor, Dr. Schlachter believes claimant had a pre-existing condition in her cervical spine that pre-disposed her to injury and impairment to both the cervical spine and shoulders. Further, Dr. Schlachter believes claimant would not have her current impairment and disability “but for” the pre-existing condition that the chiropractor had intermittently treated since 1988. The Appeals Board finds the ultimate impairment and disability to the neck and shoulders would not have occurred “but for” the pre-existing impairment in the cervical spine. Therefore, the Kansas Workers Compensation Fund is responsible for all costs of the award associated with the neck and shoulders injuries. The Appeals Board finds that the Kansas Workers Compensation Fund has no liability regarding injury to the hands and wrists because the medical evidence fails to establish a causal relationship between the injury and any pre-existing impairment. Because Dr. Schlachter's impairment of function rating to the cervical spine and neck comprises nearly fifty percent (50%) of the impairment rating to the whole body, the Kansas Workers Compensation Fund should be responsible for fifty percent (50%) of the temporary total and permanent partial disability benefits and costs pertaining to this proceeding. K.S.A. 1992 Supp. 44-567 provides that the Kansas Workers Compensation Fund is responsible for the proportion of the award that is attributable to the employee's pre-existing impairment as determined in an equitable and reasonable manner.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rita L. Gannaway, and against the respondent, Dold Foods, Inc., its insurance carrier, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred by a series of accidents from April 1990 through May 15, 1992, and based upon an average weekly wage of $451.52, for 415 weeks of compensation at the rate of $75.26 for a 25% permanent partial general body impairment of function, making a total award of $31,232.90.

As of December 9, 1994, there is due and owing claimant 134.14 weeks of permanent partial disability compensation at the rate of $75.26 per week in the sum of $10,095.38, less amounts previously paid. The remaining balance of $21,137.52 is to be paid for 280.86 weeks at the rate of $75.26 per week, until fully paid or further order of the Director.

Unauthorized medical expense of up to $350.00 is ordered paid to claimant upon presentation of proof of such expense.

The Kansas Workers Compensation Fund is hereby ordered to pay 50% of the temporary total and permanent partial disability benefits paid or to be paid on this claim and all medical expense for treatment of the neck and shoulders. The respondent and insurance carrier are responsible for the medical expense for treatment of the hands and wrists. Future medical expense may be authorized upon proper application to the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are hereby assessed 50% to the respondent and 50% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of preliminary hearing	$67.90
Transcript of regular hearing	$212.90
Ireland Court Reporting	
Deposition of Ernest R. Schlachter, M.D.	$168.47
Todd Reporting	
Deposition of Jerry D. Hardin	$345.20
Deposition Services	
Deposition of J. Mark Melhorn, M.D.	$180.40
Court Reporting Service	
Deposition of Brian Hendrickson	$122.60

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority decision. Dr. Melhorn testified claimant did not need permanent restrictions because, in his opinion, she did not sustain permanent injury while working for the respondent. Dr. Melhorn's opinion is not supported by the evidence and is contradicted by his own testimony. Therefore, the doctor's opinion should be given little, if any, weight in determining claimant's disability.

In determining disability, the majority gives equal weight to the opinions of Doctors Melhorn and Schlachter and is, therefore, inconsistent in its analysis. Although the Appeals Board finds claimant has sustained permanent injury and impairment and is entitled to benefits, it then factors in Dr. Melhorn's opinion of no impairment and utilizes a zero percent (0%) loss of ability to perform work in the open labor market and a zero percent (0%) loss of ability to earn comparable wage to obtain the percentage of work disability. To avoid such inconsistency, a work disability in this matter should be based upon the evidence from sources other than Dr. Melhorn. As claimant testified, the restrictions provided by Dr. Blaty, the physician specifically authorized by the Administrative Law Judge for evaluation, were very similar to those of Dr. Schlachter.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Douglas D. Johnson, Wichita, KS
Marvin R. Appling, Wichita, Ks
William F. Morrissey, Special Administrative Law Judge
George Gomez, Directory